

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>KAREN L. DAHL</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 223,144 & 231,525
<b>THE JONES STORE COMPANY</b>	)	
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant appealed the January 31, 2001 Award and February 7, 2001 Nunc Pro Tunc entered by Administrative Law Judge Steven J. Howard. The Board heard oral argument on August 15, 2001.

**APPEARANCES**

James R. Shetlar of Overland Park, Kansas, appeared for claimant. Stephanie Warmund of Overland Park, Kansas, appeared for respondent and its insurance carrier. Jeffrey Austin of Overland Park, Kansas, appeared in this claim for the Workers Compensation Fund, but Mr. Austin did not appear at the August 15, 2001 oral argument as the Fund had previously settled the claim that respondent and its insurance carrier had made against it.

**RECORD AND STIPULATIONS**

The evidentiary record considered by the Board and the parties' stipulations are listed in the Award.

**ISSUES**

Claimant filed four Applications for Hearing alleging bilateral shoulder and bilateral upper extremity injuries resulting from a series of traumas during various periods ending

December 5, 1997, plus injuries from a specific accident that allegedly occurred on December 5, 1997.

While working for respondent, claimant developed both bilateral carpal tunnel syndrome and bilateral rotator cuff arthrosis with rotator cuff tears in the shoulders. In the January 31, 2001 Award, Judge Howard found the bilateral carpal tunnel syndrome was either caused or aggravated by claimant's work activities but determined the bilateral shoulder problems were not related to her work. The Judge awarded claimant an 11 percent permanent partial general disability, which was based upon claimant's functional impairment rating.

Claimant contends Judge Howard erred. Claimant argues that she injured her shoulders working for respondent and, therefore, she requests both disability and medical benefits for those injuries. Claimant contends she has sustained at least a 37 percent whole body functional impairment due to her upper extremity and shoulder injuries. Additionally, claimant contends she is entitled to receive temporary total disability benefits for the period from January 21, 1997, to April 4, 1997, which allegedly represents the period that claimant was off work due to having left shoulder surgery and left carpal tunnel surgery. Claimant also requests an award of permanent partial general disability benefits of at least 37 percent.

Respondent and its insurance carrier, on the other hand, contend the Award and the Nunc Pro Tunc should be affirmed. They contend the Board cannot consider the causation opinions expressed by Dr. Lanny W. Harris in his September 14, 1998 medical report to Judge Howard because the doctor did not testify in this claim.

The issues before the Board in this appeal are:

1. Should the Board consider Dr. Harris' causation opinions contained in his September 14, 1998 medical report to Judge Howard when the doctor did not testify?
2. What is claimant's functional impairment from the injuries that she sustained due to the work she performed for respondent through December 5, 1997?
3. Is claimant entitled to temporary total disability benefits for the period from January 21, 1997, to April 4, 1997?
4. Is claimant entitled to medical benefits for the bilateral shoulder condition?

#### **FINDINGS OF FACT**

After reviewing the entire record, the Board finds:

1. Claimant has worked for respondent, a department store, as a sales associate for more than 20 years. During her employment with respondent, claimant began to experience symptoms in her arms and shoulders. Since the late 1980s, claimant intermittently sought

chiropractic and medical treatment for her upper extremity symptoms. At different times, claimant was diagnosed as having rotator cuff problems and probable carpal tunnel syndrome. As claimant continued to work for respondent, her symptoms progressively worsened.

2. In October 1996, while experiencing increased symptoms in her left shoulder, claimant underwent an MRI that indicated a torn rotator cuff. Within weeks of having the MRI, claimant experienced a sharp increase in right shoulder symptoms while using a pole overhead to move garments. In November 1996, claimant had a right shoulder arthrogram that showed a full thickness tear through the supraspinatus tendon.

3. On approximately January 22, 1997, Dr. Barry Rose performed left carpal tunnel release surgery, removed a cyst from claimant's left wrist, and attempted to repair her left rotator cuff. The rotator cuff tear was not repairable. Following that surgery, claimant was off work until approximately April 4, 1997. Claimant returned to work for respondent as a sales associate and months later, on December 5, 1997, tripped over a box and, among other injuries, experienced increased symptoms in her left shoulder. Despite her injuries, claimant was continuing to work for respondent at the time of the October 2000 regular hearing.

4. According to claimant's former supervisor, Alexei Dinottis, who worked at respondent's store from June 1995 through April 1997, claimant's job duties were extremely physically demanding. Mr. Dinottis explained that the store was being remodeled, which created additional work for the sales associates as they were required to relocate whole departments and move fixtures. Mr. Dinottis also recalls claimant reporting to him that her arms and shoulders hurt from doing her work activities.

5. Claimant hired internist Daniel D. Zimmerman, M.D., to provide an expert medical opinion in this claim. Dr. Zimmerman examined claimant in April 1998 and determined that claimant had torn rotator cuffs in both shoulders and bilateral carpal tunnel syndrome. In his April 22, 1998 medical report to claimant's attorney, the doctor wrote that claimant's pain in her shoulders, hands, and wrists developed from doing repetitive activities at work.

Dr. Zimmerman rated claimant's functional impairment due to the bilateral shoulder and bilateral carpal tunnel injuries at 40 percent to the whole body. The doctor used the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA Guides) in formulating that rating.

6. Judge Howard initially appointed orthopedic surgeon Lanny W. Harris, M.D., to evaluate claimant. Dr. Harris examined claimant in August 1998 and diagnosed advanced severe rotator cuff arthrosis with rotator cuff tears in both shoulders, degenerative changes of the glenohumeral joints bilaterally, and bilateral carpal tunnel syndrome.

In his September 14, 1998 report to Judge Howard, Dr. Harris wrote that it appeared claimant's shoulder injuries occurred over a period of time from repetitive lifting at work and that claimant's carpal tunnel syndrome developed from repetitive use.

Using the fourth edition of the *AMA Guides*, Dr. Harris rated claimant's functional impairment due to the bilateral shoulder and bilateral carpal tunnel syndrome conditions at 37 percent to the whole body. The doctor also wrote that claimant should be restricted from overhead lifting or any overhead activities and that she is unable to push, pull, or repetitively rotate her shoulders to any significant extent.

7. Judge Howard later appointed orthopedic surgeon Lowry Jones, Jr., M.D., to evaluate claimant. Dr. Jones examined claimant in February 2000 and diagnosed chronic rotator cuff arthropathy in both shoulders and chronic bilateral carpal tunnel disease.

Dr. Jones did not believe that claimant's employment at respondent's store added any additional impairment to claimant's shoulders. In his February 2, 2000 medical report to Judge Howard, Dr. Jones wrote that claimant's shoulder problems were not the result of her work activities but, instead, due to a progressive disease process. In that report, the doctor also stated that he could not document that claimant's work activities were repetitive enough to be the source of claimant's carpal tunnel disease. Conversely, Dr. Jones admitted during his deposition that claimant's work was more physically demanding than he had initially believed and, therefore, the carpal tunnel disease might be related to her work.

Dr. Jones also testified the functional impairment ratings provided by Drs. Harris and Zimmerman were appropriate.

8. When considering the entire record, the Board finds it is more probably true than not that claimant's work activities permanently injured and aggravated her shoulders and arms.

Claimant's job required the repetitive use of her upper extremities and often required her to work overhead. Claimant's former supervisor, Mr. Dinottis, relates claimant's shoulder and arm complaints to a period when respondent's store was being remodeled and claimant was performing extremely physically demanding work. Finally, both Drs. Harris and Zimmerman relate claimant's bilateral shoulder and bilateral arm injuries to her work activities. Even Dr. Jones conceded that claimant's work activities were more physically demanding than he initially believed and that those activities were capable of causing claimant's shoulder symptoms to become symptomatic.

The Board finds and concludes that claimant has sustained a 37 percent whole body functional impairment as a result of the work-related bilateral shoulder and bilateral upper extremity injuries.

### CONCLUSIONS OF LAW

1. The Award and the Nunc Pro Tunc should be modified to award claimant (1) workers compensation benefits for a 37 percent whole body functional impairment for repetitive use injuries to both arms and both shoulders sustained through December 5, 1997; (2) temporary total disability benefits for the period from January 21, 1997, to April 4, 1997; and (3) medical benefits for both the bilateral shoulder and bilateral arm injuries.

2. Because Dr. Harris did not testify, respondent and its insurance carrier objected to the Board considering the causation opinions contained in Dr. Harris' September 14, 1998 report to Judge Howard. The Board concludes that the entire report, including the doctor's opinions regarding the cause of claimant's injuries, should be included in the evidentiary record and considered in determining this claim.

First, respondent and its insurance carrier did not object when Dr. Harris' report was offered into evidence at Dr. Zimmerman's deposition. Second, the 2000 Legislature amended K.S.A. 44-516 to require the administrative law judge and Board to consider the report of an independent medical examiner who is appointed by a judge. That statute now reads:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. **The report of any such health care provider shall be considered by the administrative law judge in making the final determination.** (Emphasis added.)

The 2000 legislative amendment only affects the evidentiary procedure utilized in a workers compensation claim. The amendment did not change the parties' substantive rights or obligations. Therefore, the amendment is procedural and applies retroactively to this claim.

On the other hand, the medical opinions of Dr. Rose contained in the records from the Kansas City Bone and Joint Clinic, Inc., should not be considered in deciding this claim. Respondent and its insurance carrier lodged a timely objection to those records at Mike Stephenson's deposition. Because Dr. Rose did not testify, the fact finder should not consider the doctor's expert medical opinions.<sup>1</sup>

3. Claimant's testimony is uncontradicted that she was taken off work and was unable to work from approximately January 21, 1997, to approximately April 4, 1997, due to her left shoulder and left wrist surgeries. Therefore, claimant is entitled to temporary total disability benefits for that period.

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<sup>1</sup> See K.S.A. 44-519.

4. Claimant is entitled to receive medical benefits for treatment of both her bilateral shoulder injuries and bilateral carpal tunnel syndrome conditions. Therefore, respondent and its insurance carrier are responsible for the reasonable and necessary medical expenses incurred by claimant to date for those injuries and unauthorized medical benefits up to the \$500 statutory maximum. Additionally, in the future claimant may apply for additional medical benefits to the Director of the Division of Workers Compensation.

### **AWARD**

**WHEREFORE**, the Board modifies the Award and Nunc Pro Tunc and awards claimant 10.43 weeks of temporary total disability benefits; a 37 percent permanent partial general disability; and the medical benefits discussed in Conclusions of Law paragraph four above.

Karen L. Dahl is granted compensation from The Jones Store Company and its insurance carrier for a December 5, 1997 accident and resulting disability. Based upon an average weekly wage of \$341.25, Ms. Dahl is entitled to receive 10.43 weeks of temporary total disability benefits at \$227.51 per week, or \$2,372.93, plus 153.55 weeks of permanent partial disability benefits at \$227.51 per week, or \$34,934.16, for a 37 percent permanent partial general disability, making a total award of \$37,307.09, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award and Nunc Pro Tunc that are not inconsistent with the above.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James R. Shetlar, Attorney for Claimant  
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier  
Jeffrey Austin, Attorney for Fund  
Steven J. Howard, Administrative Law Judge  
Philip S. Harness, Workers Compensation Director